INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	11

CITATIONS

Cases:

Alabama Power Co. v. *Ickes*, 302 U. S. 464 — 4

Associated Industries v. *Ickes*, 134 F. 2d 694 — 8

Duke Power Co. v. *Greenwood County*, 302 U. S. 485 — 4

Federal Communications Commission v. *Sanders Radio Station*, 309 U. S. 470 — 8

Grace Line, Inc., et al. v. *Panama Canal Company*, C. A. 2, No. 111, Oct. Term, 1956 (decided April 8, 1957) — 10, 11

Heikkila v. *Barber*, 345 U. S. 229 — 7

Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U. S. 884 — 3, 4, 5, 7, 10

Perkins v. *Lukens Steel Co.*, 310 U. S. 113 — 6

Starr v. *Nashville Housing Authority*, No. 936, Oct. Term, 1956 — 6

Tennessee Power Co. v. *T. V. A.*, 306 U. S. 118 — 4

Wong Yang Sung v. *McGrath*, 339 U. S. 33 — 7

Statutes:

Administrative Procedure Act, Section 10 (a), 60 Stat. 243, 5 U. S. C. 1009 (a) — 2, 5, 7, 8, 9, 10, 11

Civil Aeronautics Act, Section 1006, 49 U. S. C. 646 — 8

Communications Act, Section 402 (b) (6), 47 U. S. C. 402 (b) (6) — 8

Natural Gas Act, Section 19 (b), 15 U. S. C. 717r (b) — 8

Rural Electrification Act of 1936, as amended, Section 4, 49 Stat. 1365, 58 Stat. 739–40, 925, 63 Stat. 948, 7 U. S. C. 904 — 2, 3, 5, 6, 8

Securities Act, Section 9, 15 U. S. C. 77i — 8

Miscellaneous:

Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 83 — 10

S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act, Legislative History, p. 310 — 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1036

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–2a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was originally entered on February 28, 1957 (Pet. App. 2a) and was amended on March 12, 1957 (Pet. App. 3a). The petition for a writ of certiorari was filed on May 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a private electric utility company has standing, under Section 4 of the Rural Electrification Act of 1936, as amended, or under Section 10 (a) of the Administrative Procedure Act, to attack the legality of a loan by the Rural Electrification Administration to a rural electric cooperative for the construction of an electric transmission line, where the private company claims that the resulting competition will cause it economic loss.

STATUTES INVOLVED

Section 4 of the Rural Electrification Act of 1936, as amended (49 Stat. 1365, 58 Stat. 739–40, 925, 63 Stat. 948, 7 U. S. C. 904), reads in pertinent part as follows:

> The Administrator is authorized and empowered * * * to make loans for rural electrification to * * * cooperative, nonprofit, or limited-dividend associations * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, * * *.

Section 10 (a) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009 (a)), reads in pertinent part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) * * * Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the

meaning of any relevant statute, shall be entitled to judicial review thereof.

STATEMENT

This case was instituted by the filing of a complaint by petitioner Iowa-Illinois Gas and Electric Company in the district court on August 31, 1956. The complaint sought (1) a declaratory judgment that a certain loan of money by Rural Electrification Administration to a cooperative for the construction of a transmission line to enable the cooperative to serve a customer theretofore supplied by petitioner was illegal, (2) a permanent injunction against respondents from carrying out the provisions of the loan agreement, and (3) a preliminary injunction pending final hearing and determination (R. 2–9). Petitioner's complaint was founded principally on the theory that, since the customer involved was receiving central station service from petitioner, there was no authority under Section 4 of the Rural Electrification Act (*supra*, p. 2) to make a loan to a cooperative to enable it to supply the power requirements on an addition which was being constructed to the facilities of the customer. In denying the preliminary injunction on the ground that Iowa-Illinois lacked standing to attack the loan, the district court was "unable in principle to distinguish the case at bar from *Kansas City Power and Light Co.* v. *McKay*, 96 U. S. App. D. C. 273," 225 F. 2d 924, certiorari denied, 350 U. S. 884 (R. 29).[1]

[1] The district court also denied Iowa-Illinois' application for a stay pending appeal. Since Iowa-Illinois did not renew its application for a stay in the Court of Appeals, the construction of the transmission line went forward. We are advised that

On appeal, the court below also affirmed on the authority of the *Kansas City* case and remanded with directions to dismiss the complaint (Pet. App. 1a–2a, 3a).

ARGUMENT

In *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, a number of private electric utility companies sought to attack the legality of loans made by the Rural Electrification Administration to electric cooperatives. The Court of Appeals for the District of Columbia Circuit there ruled that, since the loans, even if illegal, resulted solely in economic injury resulting from competition, the companies were without standing to contest the loans. In so concluding, the Court of Appeals relied, *inter alia*, upon *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118; and *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485,[2] where, in the absence of a special statutory right, this Court had similarly denied standing to electric utility companies to attack Government-financed competition. In addition, the court held that the requisite standing was not conferred upon the companies either

---

the construction has long since been completed, the line is now in operation and all but 10% of the loan has been advanced.

[2] In the *Duke Power Co.* case, this Court said (p. 490):

"Upon the question of petitioners' standing to maintain the suit, the lower court held, in substance, that the competition proposed by the county was lawful and that even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded. The opinion * * * is in harmony with [*Alabama Power Co.* v. *Ickes*, 302 U. S. 464]; and it follows that the decree must be, and it is, Affirmed."

by the Rural Electrification Act or by Section 10 (a) of the Administrative Procedure Act. The companies sought review in this Court of this denial of standing (see Petition in No. 370, Oct. Term, 1955). The Court denied certiorari, 350 U. S. 884.

The critical facts in *Kansas City* are substantially identical to those in the present case[3] and both the lower courts, being of the view that the instant case is indistinguishable from *Kansas City*, held on the authority of that case that Iowa-Illinois similarly has no standing to attack the loan here. The same reasons militating against further review in *Kansas City* (see Brief in Opposition in No. 370, Oct. Term, 1955, particularly pp. 15–21) are fully applicable here.

1. Contrary to petitioner's implication (see Pet. 8–9; compare Petition in No. 370, Oct. Term, 1955, pp. 27–28), electric companies were not the intended beneficiaries of the Rural Electrification Act which was enacted to bring electric power and energy to persons in rural areas not receiving central station service. See *Kansas City* case, 225 F. 2d at 931, fn. 11.[4] Moreover, the Act does not in terms confer

[3] Although on the merits *Kansas City* involved a complicated factual situation, the facts pertinent to the standing issue were not, as petitioner contends (Pet. 11–12), substantially more complicated than those of this case.

[4] Petitioner suggests that, since it was engaged in service to ultimate consumers, it has a direct interest in the central station provision of the Rural Electrification Act, unlike the petitioners in *Kansas City*, which were generally engaged primarily in generation and transmission of electricity at wholesale (Pet. 11). This contention ignores the fact that in both cases the es-

any rights upon the power companies, although they may qualify as recipients of REA loans. The Act does not regulate or impose restraints upon the manner in which Iowa-Illinois conducts its business. Nor does it contain any provision for holding hearings, issuing orders, permitting intervention, or judicial review; nor is there any reference to "persons aggrieved", "persons whose interests may be adversely affected", or any of the other terms or provisions regularly associated with statutes granting a statutory right to sue.

To the extent that the Rural Electrification Act sets out the circumstances in which loans may be made, it merely provides "guide posts" by which the Government's agents are to proceed. The provisions "create duties to the Government alone. * * * The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, 129. Cf. *Starr* v. *Nashville Housing Authority*, No. 936, Oct. Term, 1956, motion to affirm granted, June 17, 1957.

Sole responsibility to superior executive and legislative authority in the present case is emphasized by

---

sence of the complaints was the competition which the respective utility companies would suffer if the loan contracts were carried out and that, in both, the REA loans were to cooperatives operating at the same trade level as the utility companies seeking to attack the loans. The impact of the threatened competition upon the respective utility companies was, therefore, for all practical purposes, the same.

the fact that the administrative programs have been under virtually continuous congressional review because they entail the expenditure of large sums of public funds requiring annual appropriations by Congress. As the court below pointed out in *Kansas City* (225 F. 2d at 931), "The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants."

2. Nor does Section 10 (a) of the Administrative Procedure Act create standing in Iowa-Illinois. Contrary to petitioner's assertions (Pet. 8–10; compare Petition in No. 370, Oct. Term, 1955, pp. 18–19), the court in *Kansas City* did not hold that the Administrative Procedure Act did not increase the availability of judicial review of agency action, or that the right of judicial review depends upon the express grant of such a right, or that the Administrative Procedure Act was to be narrowly construed. The court specifically stated a contrary view,[*] but held that in the circumstances there was "no basis for recognizing plaintiffs' standing to bring this action under the judicial review provisions of the Administrative Procedure Act" (225 F. 2d at 933).

As we have already seen (*supra*, pp. 5–7), the executive action here in question does not involve any

[*] Expressly mindful of the statements by this Court of the statute's remedial purposes in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41, and *Heikkila* v. *Barber*, 345 U. S. 229, relied on by petitioner (Pet. 6–7), the court stated that "we would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption" (225 F. 2d at 933).

regulation of petitioner, the imposition of obligation or sanctions, the denial of any rights of relief, or the determination of any status. Accordingly, since it was not a statutory beneficiary nor is it subject to any administrative action either affirmative or negative under the Rural Electrification Act, Iowa-Illinois was not "adversely affected or aggrieved * * * within the meaning of any relevant statute" even as it would construe that language (see Pet. 8-9).

Petitioner's position is even weaker when it is recognized that the phrase "adversely affected or aggrieved * * * within the meaning of any relevant statute" obviously relates, in accordance with the existing law, to those situations where a right to seek judicial review is accorded by statute to persons who have had their interests, economic or otherwise, adversely affected by actions of a Government agency although they have had no legal right violated. See, *e. g.*, Section 9 of the Securities Act, 15 U. S. C. 77i; Section 402 (b) (6) of the Communications Act, 47 U. S. C. 402 (b) (6); Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b); Section 1006 of the Civil Aeronautics Act, 49 U. S. C. 646; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700-701 (C. A. 2). Here, no legal right of Iowa-Illinois has been violated, and as already indicated (*supra*, pp. 5-7), the Rural Electrification Act was not intended to bestow rights upon private utility companies.

In addition, the legislative history of the Administration Procedure Act reveals that Section 10 (a) was

intended primarily to adopt well-established principles as to standing. In explaining the bill on the Senate floor, Senator McCarran, the Chairman of the Judiciary Committee read with approval the Attorney General's comments on Section 10 (a):

> Section 10 (a): Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: *Massachusetts* v. *Mellon* (262 U. S. 447), *The Chicago Junction Case* (264 U. S. 258), *Sprunt & Son* v. *United States* (281 U. S 249), and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications Commission* v. *Sanders Bros. Radio Station* (309 U. S. 470). [S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act, Legislative History, p. 310.]

Nowhere in the legislative history is this clear statement contradicted.

Petitioner fails to appreciate that the judicial review provisions of the Administrative Procedure Act do not prescribe a rigid rule on standing but rather have left the determination in a specific case to be "marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts'

judgment as to the probable legislative intent derived from the spirit of the statutory scheme." Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 92. This is the essence of the ruling by the Court of Appeals, and indeed, the only workable interpretation of Section 10 (a).

3. One additional matter remains for consideration. In *Grace Line, Inc., et al. v. Panama Canal Company*, C. A. 2, No. 111, October Term, 1956 (decided April 8, 1957), the Court of Appeals for the Second Circuit held, without pertinent elaboration or discussion, that "Section 10 (a) of the Administrative Procedure Act * * * confers standing on persons * * * adversely affected or aggrieved * * * within the meaning of any relevant statute'" (slip opinion, p. 1093), and in so holding pointed to, as the there "relevant statute," the Panama Canal Act of 1912, as amended, a statute dealing with the non-regulatory management of public property and conferring no rights upon the users of this property.

Although the general approach of the Court of Appeals for the Second Circuit to the question of standing in the *Grace Line* case appears to be inconsistent with that taken in the instant case, we nevertheless do not believe that certiorari should be granted here. As already indicated, the *Kansas City* holding, to which both courts below adhered, is clearly correct and in accord with the controlling precedents. Moreover, although the standing issue will be raised in the petition for a writ of certiorari which will be filed by the Panama Canal Company in *Grace Line*, this

Court may, in light of the many issues peculiar to that case which the Government will urge were decided contrary to controlling precedents, see fit to dispose of *Grace Line* without reaching the standing issue. And, finally, the factual situation in *Grace Line* is, of course, quite different from that involved in this case and in *Kansas City*.

CONCLUSION

The decision below is clearly correct and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MELVIN RICHTER.

HOWARD E. SHAPIRO,
Attorneys.

JUNE 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957